United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1060

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1060

UNITED STATES OF AMERICA,

Appellee,

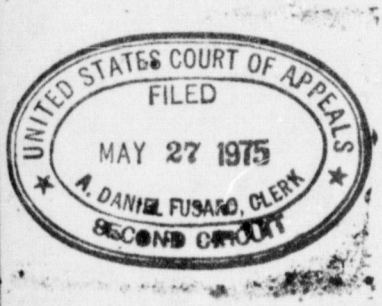
—v.—

RICHARD BARRY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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CITATIONS

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Statement of the Case

On November 16, 1973, a Federal Grand Jury sitting at Hartford, Connecticut, returned a True Bill of Indictment (H-597) charging the defendant, Richard Barry, with violation of Title 21, United States Code, Section 846, in one count. The indictment charged that the defendant had conspired to possess with intent to distribute and to distribute quantities of amphetamine between June 25, 1973, and November 16, 1973. Four unindicted co-conspirators were named in the indictment.

On January 7, 1974, the defendant entered a plea of not guilty to the indictment.

Trial by jury commenced on November 26, 1974, in United States District Court, Hartford, before the Honorable M. Joseph Blumenfeld, United States District Judge. The jury trial concluded on November 27, 1974, and after

approximately twenty minutes of deliberation, the jury returned a verdict of guilty.

Defendant was sentenced to the custody of the Attorney General for three years, to be followed by a Special Parole Term of two years pursuant to the provisions of Title 21, Section 841(b)(1)(A), on February 3, 1975. Subsequently, a timely notice of appeal was filed, and the defendant's original personal recognizance bond was continued pending this appeal.

Statutes Involved

Title 21, United States Code, Section 841(a)(1):

§ 841. *Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Title 21, United States Code, Section 846:

§ 846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Pub. L. 91—513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

Title 18, U.S.C.

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing. Added Pub.L. 90-351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115.

Question Presented

1. Did the trial court commit error in its charge to the jury?

Statement of Facts

During the evening of July 12, 1973, Special Agent John Albano, Drug Enforcement Administration, working in an undercover capacity met with two individuals, Richard Windus and Russell Thomas, in order to purchase four ounces of "speed" (amphetamine). Agent Albano followed Windus and Thomas to the corner of Kelsey and East Streets, New Britain, Connecticut, where the agent gave Windus seven hundred and twenty dollars ($720) for four ounces of "speed" (Tr. 14, 15).* Windus and Thomas then left the agent and proceeded to another location to pick up the drugs. Windus and Thomas returned to the agent's location approximately fifteen minutes later, and Windus returned the money. Thomas apologized for the failure and stated that they would not travel to New Britain again until the "connection" notified him that there were drugs available (Tr. 15, 16).

On July 17, 1973, Agent Albano again met Windus and Thomas and others, and again proceeded to the corner of Kelsey and East Streets, New Britain. The agent gave Windus seven hundred and twenty dollars and Windus, Thomas, and the others left, returning shortly thereafter, at which time Windus handed the agent four ounces of "speed". Agent Albano and Windus were conversing when Thomas motioned Windus back, and Windus explained that Thomas was concerned about a green van that had been parked outside the connection's house (Tr. 22, 23).

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* References marked "(Tr.)" refer to the transcript of proceedings in the trial court.

Agent Albano again met Windus and Thomas on July 31, 1973, and proceeded to the same location in New Britain. Agent Albano tried to get to the connection's house himself, but was told by both Windus and Thomas that this was impossible and that only Thomas would be going to the connection's house due to the connection's being "paranoid" about the green van (Tr. 25, 26, 27). After a drug related conversation during which Thomas told the agent that the connection could provide a pound of amphetamine since the connection had direct access to the laboratory located in New Britain, the agent handed Thomas fourteen hundred and forty dollars ($1,440) and Thomas subsequently returned and handed the agent eleven ounces of "speed", eight of which were for the agent (Tr. 33, 34). The apartment of the defendant, Richard Barry, was located approximately one-fourth of a mile from the corner of the East and Kelsey Streets location where the agent had waited during all of the transactions (Tr. 38).

Russell Thomas corroborated Agent Albano's testimony as to the agent's transactions with Thomas and Richard Windus (Tr. 85-117). Thomas, an unindicted co-conspirator, who had previously pleaded guilty to distribution of amphetamine in another indictment, testified that he had probably purchased "speed" from the defendant, Barry, a minimum of three dozen times prior to July 17, 1973 (Tr. 95). Thomas also stated that Richard Barry did not have a telephone (Tr. 101). Richard Windus, another unindicted co-conspirator who had also previously pleaded guilty to distribution of amphetamine, corroborated the testimony of both Agent Albano and Thomas as to Windus' involvement with Thomas and the agent in the transactions (Tr. 117-130). Windus testified that on the first two occasions he had gone to Whitman Street with Thomas, but that on July 31 he had not gone to this location with Thomas (Tr. 125).

Special Agent Terrence Sprankle, Drug Enforcement Administration, on surveillance on July 12, 1973, saw Thomas and Windus park on Whitman Street, and then he saw Thomas exit the vehicle and proceed towards 16 Whitman Street, the residence of the defendant, Barry (Tr. 134, 135). Agent Sprankle was again on surveillance on Whitman Street during the evening of July 17, 1973, in a green Ford van. The defendant, Barry, and another individual discovered the agent inside the van and told the agent to move the van from in front of a fire hydrant (Tr. 137, 138). However, the agent did see Thomas go down the driveway of 16 Whitman Street approximately thirty-five minutes later. Approximately thirty minutes later, the agent observed Thomas return from the apartment building to the vehicle in which he had arrived (Tr. 143). Agent Sprankle also saw the vehicle in which Thomas was riding on Whitman Street during the evening of July 31, 1973 (Tr. 146).

The defendant and his brother-in-law both admitted the conversation with Agent Sprankle outside the green van, but denied that the incident took place on Tuesday evening, July 17, 1973, and both claimed it took place on a Sunday noontime, probably in July 1973. During rebuttal, the Government recalled Agent Sprankle who produced some of his daily logs for the dates in question, and another surveillance agent who saw Agent Sprankle conversing with two individuals outside the green van on Tuesday, July 17, 1973 (Tr. 220, 221).

On the day on which jury trial was scheduled to commence, the defendant moved to suppress certain admissions which he had made subsequent to his arrest. The Court ruled that the motion was untimely but agreed to hear the motion during trial (Tr. 6) During the hearing, held out of the presence of the jury, Agent Albano testified that, after the defendant had been advised of his rights, the defendant admitted that he had sold "speed" in the past to Russell Thomas and one other individual whom he would not name.

The defendant also refused to name his source of supply since the source was a personal friend and Barry might wish to purchase additional amounts of "speed" from this individual (Tr. 43, 44).

The grounds for the defendant's Motion to Suppress were that defendant had been denied assistance of counsel during questioning by Federal agents and that defendant had been threatened or coerced during this questioning. The defendant testified that he had been arrested at his home and that the arresting agents told his wife where he was being taken and the telephone number, and further told his wife that she could contact a lawyer. The defendant was expecting an attorney at the time of his questioning (Tr. 59, 60). The defendant totally denied making any incriminating admissions during questioning. The Court then denied the defendant's Motion to Suppress on the grounds that the Court was not persuaded that there was a denial of assistance of counsel, and that defendant's denial of the statements reduced the making of the admissions to a question of credibility (App. 1a).*

The alleged admissions and the background surrounding them were then presented to the jury. At the close of evidence, the defendant requested a jury charge on the voluntariness of the admissions which the trial judge refused to give, having already ruled that there was no issue as to voluntariness, but merely an issue of credibility (Tr. 265).

The trial court's failure to charge the jury on the issue of voluntariness is the sole issue raised by the defendant in this appeal.

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* References marked "(App.)" refer to Appellee's Appendix.

ARGUMENT

The trial court did not commit error in its charge to the jury.

Without citing any authority, the defendant requested the Court to charge the jury as follows:

> "If it appears from the evidence in the case that an admission would not have been made, but for some threat of harm or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such an admission should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment or to secure a promised reward.
>
> "If the evidence in the case leaves the jury with a reasonable doubt as to whether an admission was voluntarily made, then the jury should disregard it entirely.
>
> "The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

In *United States* v. *Anderson*, 394 F.2d 743 (2d Cir. 1968), this Court decided a similar issue to that raised in the present case. In *Anderson* the defendant denied making admissions but was silent concerning the presence or absence of constitutional warnings. This Court held that the defendant had raised no issue as to voluntariness and consequently that the trial court had properly refused the requested instruction. In the present case, the defendant denied making the admissions but admitted that he had been fully advised of his rights and that he was expecting his attorney. Here also there was, in effect, no issue as to voluntariness, and the trial court properly refused the re-

quested instruction. The trial court specifically found, after a hearing out of the jury's presence, that there was no issue raised as to voluntariness (App. 1a), but merely a question of fact for the jury's determination, namely, whether or not Barry made the admission in question. Addressing itself to a similar situation, the Sixth Circuit stated:

> At oral argument of this case, the court was inclined to think that appellant's second issue claiming a coerced confession might have more possible merit. However, on reading the transcript of the trial, it appears that defendant himself testified and admitted that he had received constitutional warnings prior to his being questioned about the still. His testimony, in fact, was that he never made the incriminating statements at all. This then clearly became a claim not that a confession was coerced, but that in fact it wasn't made. The government agent's testimony about the incriminating statements was positive and detailed. This was a question of fact for the jury which was properly submitted to them. *United States* v. *Reeves*, 377 F.2d 524, 525 (6th Cir. 1967).

The trial court's charge to the jury in the present case, when viewed *in toto*, was completely proper (App. 2a-26a). The trial court did not instruct the jury that the admissions of the defendant could be used as evidence against him. A charge to the jury on the issue of voluntariness would have instructed the jury that if it found the admission, to have been made voluntarily, it could consider the admission as evidence against the defendant. *United States* v. *Panepinto*, 430 F.2d 613, (3d Cir.), *cert. denied*, 400 U.S. 949 (1970). In effect, the trial court thereby limited the evidence surrounding the admissions to another issue of credibility, which was more favorable to the defendant than necessary. *United States* v. *Anderson*, *supra*, at 748.

The United States Supreme Court has specifically held that there is no constitutional right of the jury to determine admissibility of a confession and that the Government's burden of proof as to voluntariness is by the preponderance of the evidence rather than beyond reasonable doubt.[1] *Lego* v. *Twomey*, 404 U.S. 477 (1972). The defendant in the instant case properly claims no error as to the admissibility of the admissions. However, the defendant does claim that Title 18, United States Code, Section 3501 (a) mandates a specific instruction to the jury regarding voluntariness on the facts of this case. Title 18, United States Code, Section 3501(a) provides:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. *Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness.* If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

The statute itself does not suggest any particular wording to be used when the Court instructs the jury "to give such weight to the confession as the jury feels it deserves under all the circumstances". Nothing in the statute necessitates a charge on voluntariness other than that the jury be instructed to consider and weigh the evidence and the credibility of the witnesses. Addressing the question of

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[1] 18 U.S.C. § 3501(a) was held inapplicable in *Lego* v. *Twomey*, *supra*, at 486.

whether a specific voluntariness instruction is required by Title 18, United States Code, Section 3501(a), the Eighth Circuit stated: "This provision does not specify any particular wording for an instruction on the weight to be afforded a confession; here the District Court instructed the jury on its responsibility to judge the credibility of the witnesses and weigh their testimony. We are not prepared to say that this instruction was inadequate for purposes of 18 U.S.C. § 3501(a)." *United States* v. *Williams*, 484 F.2d 176, 178 (8th Cir. 1973). See also *United States* v. *Panepinto, supra*, at 618 n. 15; *United States* v. *Russell*, 468 F.2d 618 (5th Cir. 1972). In the present case the District Court properly charged the jury to consider and weigh the evidence and the credibility of the witnesses.

Further, the defendant having cited no authority for his requested instruction, the Court was under no obligation to charge in the literal language of the requested instruction. There is no requirement that a court charge a jury in the language requested by a defendant. *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974); *United States* v. *Sacco*, 436 F.2d 780, 783 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971); *United States* v. *Jackson*, 390 F.2d 317, 319 (2d Cir.), *cert. denied*, 392 U.S. 935 (1968).

There is nothing, other than the defendant's speculation, in the legislative history of 18 U.S.C. § 3501 that reflects the concern of Congress that the issue of voluntariness of an admission be specifically passed upon by both the trial judge and the jury. The real concern of Congress in enacting this legislation is manifested in the following:

> The Committee is convinced from the mass of evidence heard by the subcommittee, much of which is printed in the transcript of hearings, that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement.

> Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt . . . *1968 U.S. Code Congressional and Administrative News*, p. 2112, 2132.

For the Court to hold that a specific charge on the voluntariness of an admission in a situation as in the present case where a defendant admits all constitutional warnings and denies making the admission, would be to condone and encourage perjury by all criminal defendants. Such a rule of law would give every defendant who has made an admission "two bites at the apple" of having the jury disregard the admission. In a similar situation, where a defendant denied making admissions and never contested voluntariness, the Court refused to remand for a hearing on voluntariness stating:

> In or out of the presence of the jury, the accused testifies on the record and under oath and his election to try to suppress the admitted utterance may well circumscribe what he may safely thereafter tell the jury. . . . This is not a game or a sporting contest; an oath to tell the truth has the same significance—and the same consequences—out of the presence of a jury as before a jury. *Woody* v. *United States*, 379 F.2d 130, 132 (1967), *cert. denied*, 389 U.S. 1961 (1967).

After the suppression hearing in the present case, the District Court correctly ruled that the defendant had presented no issue as to the voluntariness of his admissions, the defendant having denied making the admissions. The issues as to the circumstances surrounding the admissions and the admissions themselves were reduced to questions of credibility. Therefore, the trial court properly refused the defendant's requested instructions as to voluntariness.

CONCLUSION

The government respectfully submits that the trial court's charge to the jury was proper in all respects and that the defendant's conviction should be sustained.

Respectfully submitted,

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United States Court of Appeals

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No. 75-1060

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Appellee

v.

RICHARD BARRY
Appellant

AFFIDAVIT OF SERVICE BY MAIL

Richard Thegg, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 43 East 53rd Street Brooklyn, N.Y.

That on the 27th day of May, 1975, deponent served the within Brief and Appendix for the Appellee upon Richard M. Rittenband, Esq. 784 Farmington Ave, West Hartford, Connecticut 06119

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Richard Thegg

Sworn to before me,

This 27th day of May 1975

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977